California State Senate

SENATE SELECT COMMITTEE
ON
INTERNATIONAL TRADE POLICY AND STATE LEGISLATION

SENATOR
LIZ FIGUEROA
CHAIR

ANNA CECELIA BLACKSHAW

LEGISLATIVE OFFICE BUILDING
1020 N STREET, ROOM 551
SACRAMENTO, CA 95814

November 17, 2003

Robert B. Zoellick
United States Trade Representative
600 17th Street, N.W.
Washington, DC 20508

Dear Ambassador Zoellick:

As legislative representatives of the State of California, we are writing to express our continued concern over the potential impacts of international trade and investment agreements on our legislative and state authority. We are particularly concerned over the latest NAFTA investor to state challenge based on recent California actions to regulate mining in the Imperial Valley. As you are aware, Glamis Gold Ltd., a Canadian gold mining corporation, has filed a notice of intent to submit a claim to arbitration under NAFTA Chapter 11, alleging, among other things, that the recently enacted reclamation requirements for mines located near Native American sacred sites violate NAFTA's investor protection provisions. Glamis has indicated that it intends to seek damages from the United States of at least $50 million.

The case, *Glamis Gold Ltd. v. United States*, provides a striking demonstration of the threats posed to the traditional regulatory power of state governments as a result of current models of trade and investment agreements. The statutory and regulatory actions taken by the State of California, after extensive and years-long debate, were deemed necessary to mitigate the devastating impacts of hardrock mining, which the Environmental Protection Agency says is responsible for the pollution of 40% of Western watersheds. Under the new regulations, open-pit mines are required to be backfilled at the end of operations, an effective means of reducing acid mine drainage and other eco-system degradations, including air and water quality.

The California actions were also intended to protect lands of significant religious and cultural value to Native Americans. In this case, the Quechan Indian Nation and other Colorado River tribes who view the 1,600 acres in the Indian Pass, on which Glamis proposes to mine, as a deeply historic and culturally valuable landscape.

These are legitimate actions consistent with the authority granted States under our federalist system as keepers of the public health, safety and welfare, and it is deeply troubling to us that a victory in this case for Glamis Gold would undermine this authority.

The Glamis Gold claim also illustrates the potential for international investment agreements to extend greater rights to foreign investors than domestic law extends to domestic investors. The *Glamis* claim would fail under U.S. law but could succeed under the investor provisions of NAFTA.

Finally, we are concerned that recent bilateral treaties, the investment chapters of recent free trade agreements, and the most recent draft of the agreement for the Free Trade Area of the Americas include language on government assets that further extends the rights of foreign investors. This raises the possibility that similar disputes involving natural resources or other government assets could have a greater chance of success under post-NAFTA investment agreements.

Below we outline our concerns in these areas and conclude with a series of questions in the hope that you can provide clarification to these complex issues.

Glamis Gold Ltd. v. United States

The Glamis claim centers around the Nevada corporation Glamis Imperial, a wholly owned subsidiary of claimant Glamis Gold, which sought to explore and extract gold deposits on federal lands in Imperial County, California. In 1994, Glamis Imperial submitted a plan of operation for a 1,600 acre open-pit gold mine to the U.S. Department of Interior. In January 2001, then Secretary of Interior Bruce Babbitt denied a permit for the mine based on the Secretary's finding that the operation would cause undue impairment of the cultural and historic value of Native American sacred sites. In November 2001, the new Secretary of Interior Gale Norton reversed her predecessor's decision, clearing the way for a final permit.

In April 2003, the State of California enacted mining regulations that require complete backfilling and recontouring of all new open-pit metallic mines within one mile of Native American sacred sites. The new regulations directly impact Glamis Imperial's proposed open-pit mining operation, which encompasses a number of sites sacred to the neighboring Quechan tribe, including tribal ceremonial grounds and significant archaeological sites. Glamis Gold claims that the regulations have destroyed the value of the company's investment in the proposed Imperial County mining operation in violation of the expropriation provisions of NAFTA.

California's new mining regulations do place an additional economic burden on any mining operation impacted by the requirements, but the regulations at issue clearly fall within the traditional scope of the legitimate regulatory power of state governments. The Mining Law of 1872, under which Glamis Imperial established its Imperial County mining claims, expressly allows states to impose regulations on any mining operation covered by the law.

Our concern results from the possible implications if the *Glamis* claim succeeds under the provisions of NAFTA Chapter 11. While the terms of NAFTA do not directly overrule state law, a victory for the claimant nevertheless would undermine the traditional regulatory power of states. Domestic law clearly permits the State of California to enact measures to protect the public interest, and an international trade agreement should not have the effect of compromising that authority.

"No Greater Rights" Principle

In 2002, the California State Legislature enacted Senate Joint Resolution 40, which stated that international investment agreements should not give "greater rights to foreign investors than United States investors enjoy under the United States Constitution." Congress subsequently embraced that position in the Trade Promotion Act of 2002, stating that the language of international trade and investment agreements should ensure that "foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than U.S. investors in the United States." The *Glamis* claim demonstrates how international investment rules could provide foreign investors with greater rights than U.S. citizens enjoy under the Constitution, exemplifying the concerns that motivated the "no greater rights" provisions.

Domestic courts have repeatedly upheld the authority of states to regulate mining claims covered by the Mining Law of 1872, particularly in the context of environmental regulations. Accordingly, under domestic law, the *Glamis* claim would fail. California enacted its recent mining regulations to protect environmentally sensitive lands and preserve the significant cultural and historical value of sacred sites. Such regulations clearly fall within the range of state measures permitted by the Mining Law and domestic jurisprudence. If *Glamis* succeeds under the provisions of NAFTA, that outcome would represent a substantial expansion of foreign investor rights beyond the rights granted to domestic investors under domestic law.

Agreements Involving Government Assets

Recent U.S. bilateral investment treaties and the investment chapters of the U.S.-Chile and U.S.-Singapore Free Trade Agreements contain language that extends the investor-state dispute resolution mechanism to "investment agreements" involving natural resources and other government assets. This language gives international arbitral tribunals the power to interpret and enforce government asset agreements such as the mineral extraction permit at stake in the *Glamis* dispute.

Proposed provisions in the most recent draft of the agreement for the Free Trade Area of the Americas further expand investor protections by placing agreements involving natural resources and other government assets within the definition of protected "investment." Such provisions would bring government asset agreements within the broad scope of the agreement's other investor protections, including minimum treatment and protection against expropriation. Accordingly, these provisions would give future claims similar to the *Glamis* claim a greater chance for success and further undermine state regulatory authority.

In view of these concerns, we respectfully submit the following questions:

Preemption of state law and reimbursement of damages paid. If the *Glamis* claim succeeds, the U.S. Government could be ordered to pay tens of millions of dollars in damages to Glamis Gold, partly as the result of regulations enacted by California.

a. Will USTR provide a commitment that the federal government will vigorously defend against *Glamis'* claim?

b. Will USTR provide a commitment that the federal government will not sue to preempt the California regulations at issue in *Glamis*?
c. Will USTR provide a commitment that the federal government will not seek any form of financial compensation from California for damages awarded to the claimant?
d. Will USTR provide a commitment that the federal government will not otherwise act to undermine the California regulations at issue in *Glamis*?

2 ***Compliance with "no greater rights" principle.*** The *Glamis* claim would fail on the merits under U.S. law, which subjects mining claims on federal lands to any state regulation that does not constitute a direct taking or outright ban of mining activity. Some believe, however, that the claim could succeed under the provisions of NAFTA Chapter 11.

a. Do you intend to argue that the expropriation provisions of NAFTA preclude the success of the *Glamis* claim, which challenges California mining regulations permitted by U.S. law?
b. Which provisions of NAFTA prevent claims like *Glamis*, which demands payment of damages for state regulations that merely diminish the value of mining claims?

3. ***Government asset agreements.*** Language in recent investment agreements, including recent U.S. bilateral investment treaties, recent free trade agreements, and the proposed draft agreement for the Free Trade Area of the Americas, expands explicit investor protections for agreements involving natural resources and other government assets.

a. Do these provisions substantively expand the investor protections already provided for in NAFTA? If not, what purpose does the language serve?
b. What procedural recourse do parties have in the case that an international arbitral tribunal fails to interpret faithfully the contents of a government assets agreement concluded under U.S. law? Why is an international arbitral tribunal more qualified than a U.S. court to interpret an agreement under U.S. law?
c. Language in the draft agreement for the Free Trade Area of the Americas that places agreements involving government assets within the definition of "investment" appears to extend substantive investor protections, such as minimum treatment, to any government asset agreement. Does USTR concur with this interpretation?

4 ***Business activity as covered investment.*** Does the activity of doing business or the activity of making a profit by a foreign investor constitute a form of investment protected from indirect expropriation under Chapter 11 of NAFTA or the investment chapters of the U.S-Singapore and U.S.-Chile Free Trade Agreements?

5 ***Rights other than property rights as covered investment.*** The tribunal in *S.D. Myers v. Canada* stated that "in legal theory, [under NAFTA] rights other than property rights may be 'expropriated.'" *S.D. Myers v. Canada*, Partial Award at para. 281 (Nov. 13, 2000).

a. Is this an accurate statement of the international law of expropriation?
b. What rights other than property rights is the decision referring to?
c. In light of your answers to the first three questions here, please identify the areas in which states may lawfully regulate without fear of violating NAFTA.

6. ***Market access as covered investment.*** The Tribunal in *Pope & Talbot v. Canada* indicated that "access to the U.S. market is a property interest subject to protection" from expropriation under NAFTA. *See Pope & Talbot v. Canada*, Interim Award, para. 96 (June 26, 2000).

   a. Is this an accurate statement of the international law of expropriation?
   b. Is market access a protected property interest for the purposes of the Takings Clause of the Fifth Amendment of the United States Constitution?

7 ***Partial and temporary takings.*** The Tribunal in *S.D. Myers v. Canada* stated that "in some contexts and circumstances, it would be appropriate to view a deprivation [of economic rights] as amounting to an expropriation, *even if it were partial or temporary*." *S.D. Myers v. Canada,* Partial Award, at para. 283 (Nov. 13, 2000).

   a. Is this a correct statement of the international law of expropriation?

8 ***U.S.T.R. policy on consulting with California legislators.*** Please explain the ways in which your office will work to consult with the California Attorney General, Governor and Legislature in regards to the *Glamis* claim.

In closing, we fully recognize the importance of investor protections in the promotion and development of free trade. As representatives of one of the world's largest economies, we acknowledge and welcome the benefits of trade; however, the issues and questions raised by the *Glamis* case implicate policy concerns apart from the protection of state regulatory power. Many of our current and prospective trading partners have concerns similar to those raised in this letter, particularly those countries with extensive natural resources and other valuable government assets. Meaningful efforts to address these and other potential problems with investment language in international trade agreements undoubtedly will play a vital role in successfully promoting a strong U.S. trade agenda both now and in the future.

Thank you for your careful attention to these important questions. We greatly appreciate the assistance that your office has provided to members of our institution in the past, and we look forward to receiving your reply to our present queries.

Sincerely,

Senator Liz Figueroa

Senator Sheila Kuehl

Assemblymember Loni Hancock

Assemblymember John Longville

Assemblymember Mark Ridley-Thomas

Senator Joe Dunn

Senator Debra Bowen

Assemblymember Fabian Nunez

Senator John Vasconcellos

Assemblymember Leland Yee

Assemblymember Sally

Assemblymember Jackie Goldberg

Assemblymember Lloyd Levine

Assemblymember Pat Wiggins

Senator Gloria Romero